

NO. 83516-1

SUPREME COURT OF THE STATE OF WASHINGTON

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IN RE THE WELFARE OF:

K.N.J.

A Minor Child.

DSHS'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Appellant M.J. is the father of four-and-a-half year old K.N.J., who has been in foster care since she was brutally assaulted by her mother at age five months. The father assigns no error to any of the facts that show he is currently unfit to parent and that supported termination of his parental rights. Instead, he urges restoration of his parental rights because a judge pro tempore entered an order upon his default, without his consent, that found K.N.J. to be a dependent child.

Although there is no dispute that the initial default order of dependency was invalid, the periodic review and reaffirmation of the child's dependent status over the next two years by constitutionally qualified judges cured that defect. The court of appeals was correct in holding that the Department of Social and Health Services (DSHS) met its burden to show K.N.J. was found to be a dependent child, as required by RCW 13.34.180(1)(a).

II. STATEMENT OF ISSUES

The initial order of dependency was invalid because it was entered by a judge pro tempore without the written consent of the father. Where qualified judges subsequently entered review orders reaffirming the child's status as a "dependent child," did the trial court correctly determine that DSHS met its burden under the termination of parental rights statute

to prove there was a finding that the child was dependent?

III. STATEMENT OF THE CASE .

K.N.J., the little girl whose welfare is the subject of this appeal, was placed into protective custody on February 11, 2006, by child protective services in Eugene, Oregon. Clerk's Papers (CP) at 310, Findings of Fact (FF) 1.9.¹ The child is a resident of Washington and was in Oregon with her mother and father when a relative became concerned for the child's safety and took her to the hospital. *Id.* K.N.J., then just five months old, was admitted to a pediatric critical care unit. She was near death, suffering from a broken leg, broken wrist, broken clavicle, broken shoulder, broken ribs, scars on her face, dehydration, and malnutrition. Report of Proceedings (RP) at 27-28, 224, 257-58; CP at 260-67. The child spent three months in the hospital. RP at 261. The mother was convicted of assaulting K.N.J. *See* CP at 189.

While the family was physically in Oregon when child protective services first removed the child, the parent's place of residence was Snohomish County. RP at 31, 220. The father reportedly did not live in the home because a domestic violence protection order prevented him from having contact with the mother; however they did travel to Oregon as

¹ The father has not assigned error to any of the findings of fact cited herein. Therefore they are verities on appeal. *In re Interest of J.F.*, 109 Wn. App. 718, 722, 37 P.3d 1227 (2001).

a family. RP at 28-29, 31, 220, 251. The father believed the mother was “crazy,” and that she was mistreating and starving the infant. RP at 30-31, 220-23, 251-53; *See also* RP at 125-26, 136.

Based on the Oregon child protective services action, DSHS filed a petition in Snohomish County alleging K.N.J. was a dependent child. CP at 260-67. On February 24, 2006, the father was personally served with the petition and a notice and summons. CP at 423-26; Ex. 3. He knew the dependency petition had been filed and knew the hearing dates. RP at 33-34. He also knew he had a right to request a lawyer. RP at 262.

On April 18, 2006, the juvenile court conducted a preliminary hearing on K.N.J.’s dependency case. CP at 430. Retired Superior Court Judge Kathryn Trumbull was sitting as judge pro tempore. *Id.* The father did not appear, and therefore did not consent to a judge pro tempore hearing his case. CP at 429. The judge found the father in default and entered an order finding the child dependent. CP at 225-232, 423-26.

On January 25, 2007, the juvenile court conducted a dependency review and permanency planning hearing.² CP at 156-63. The father did not appear and had not requested an attorney. CP at 156, 163; RP at 7-8, 262. Superior Court Judge Ellen Fair found that the father had not

² Prior to 2009, dependency cases in Snohomish County, including this case, were reviewed by a Foster Care Citizens Review Board (FCCRB) for the first year after the dependency petition was filed. *See* former RCW 13.70.

completed any remedial services, and had attended just five of 17 possible visits with K.N.J. CP at 157. She found that the child had been residing in foster care for nearly 12 months, that court supervision should continue, and that it was contrary to the child's welfare to be returned home. CP at 158. She found K.N.J. "remains a dependent child pursuant to RCW 13.34.030." CP at 159.

On February 12, 2007, DSHS filed a petition to terminate the parents' rights to K.N.J. CP at 406-420. The mother's rights were terminated by default on May 8, 2007. *See* CP at 122. From January through September 2007, DSHS did not know the father's location. RP at 128.

On July 5, 2007, Judge Fair conducted another dependency review hearing. CP at 121-127, 318; FF 1.22. Judge Fair found that the father had not participated in any remedial services and had not visited K.N.J. CP at 122. She found that the child had been residing in foster care for more than 16 months and that court supervision should continue. CP at 122-23. Judge Fair again held that K.N.J. "remains a dependent child pursuant to RCW 13.34.030." CP at 124.

The father was personally served with the termination petition in September 2007 while he was incarcerated in the Snohomish County Jail. CP at 320; RP at 129; FF 1.31. The DSHS social worker advised the

father of his right to counsel and lent him her cell phone to call to ask for appointment of an attorney. RP at 129-30.

The juvenile court conducted another dependency review hearing on November 21, 2007. CP at 81-91, 318-19; FF 1.24. The father did not personally appear at the hearing, but was represented by counsel. CP at 81, 91. Judge David Kurtz found that court supervision should continue over K.N.J. CP at 83. He ordered that she “remains a dependent child pursuant to RCW 13.34.030.” CP at 87.

The trial on the petition to terminate the father’s parental rights began on May 5, 2008, before Judge Kenneth Cowsert. On the first day of trial, the father brought a motion under the termination cause number to vacate the April 2006 order of dependency on the ground it was invalid because it was entered without his consent by a judge pro tempore. RP at 5-11. The trial court ruled it did not have authority to vacate an order entered in a different cause, but that the father could argue that DSHS failed to meet its burden under RCW 13.34.180(1)(a) (“that the child has been found to be a dependent child”). RP at 11-13.

On May 17, 2008, the trial court denied the father’s motion to vacate the dependency order. CP at 358-61. The trial court subsequently granted the petition to terminate the father’s rights. CP at 309-327, 358-361. RP at 386-396.

The father appealed. CP at 4-38, 270-308. The court of appeals affirmed the termination order. *In re Dependency of K.N.J.*, 151 Wn. App. 306, 211 P.3d 483 (2009). This Court granted review.

IV. ARGUMENT

The father asks this Court to disrupt K.N.J.'s opportunity for permanence based on a procedural error that was both corrected and rendered harmless through dependency review proceedings. The Court should reject his attempt to revive an error that was unchallenged for more than two years and that was corrected through multiple subsequent proceedings in the dependency. Contrary to the father's assertion in his request for review, the court of appeals decision is consistent with *In re Chubb*, 112 Wn.2d 719, 773 P.2d 851 (1989).

Further, the court of appeals decision correctly applied established law that an implicit finding that a child is dependent is made at each dependency review hearing. See *In re A.W.*, 53 Wn. App. 22, 765 P.2d 307 (1988); *In re Henderson*, 29 Wn. App. 748, 630 P.2d 944 (1981); *In re H.S.*, 94 Wn. App. 511, 973 P.2d 474 (1999).

A. The Defect In The Initial Dependency Order Was Cured As A Matter Of Law During Subsequent Dependency Proceedings

DSHS agrees with the court of appeals that the state constitution and state statutes require the written consent of a parent before a judge pro

tempore can enter an order of dependency. *K.N.J.*, 151 Wn. App. at 310-11. That did not happen in this case. The initial order of dependency was signed by a retired superior court judge sitting as judge pro tempore. Although the father was personally served with notice of the hearing, he failed to appear, and the initial order of dependency was entered against him by default. Because he was not present to consent to the judge pro tempore, the order of dependency was invalid.

The issue here, however, is whether DSHS proved the first element of the termination statute, RCW 13.34.180(1)(a), that *K.N.J.* was found to be a dependent child. Although the order of dependency was invalid, the procedures required under the dependency statute, RCW 13.34, cured the error. The statutorily required ongoing dependency review hearings result in a continuous reassessment and determination of the child's dependency status every six months. This redetermination of the child's status is sufficient proof under the termination statute that the child has been found to be a dependent child.

1. The Dependency Review Process Resulted In Ongoing Findings That *K.N.J.* Was A Dependent Child

Dependency proceedings under RCW 13.34 are designed to protect children from abuse and neglect. As detailed below, there is no dispute that *K.N.J.* was abused and neglected, and no contention that the initial

adjudication of dependency was incorrect on the merits. An adjudication of dependency allows the juvenile court to order remedial services aimed at assisting the parents in correcting the problems that resulted in state intervention so that the family can be reunified. *A.W.*, 53 Wn. App. at 27. Once a child has been found to be dependent, the child's status must be reviewed by the juvenile court every six months. RCW 13.34.138. At each review hearing, the juvenile court assesses whether or not the child's dependent status should continue.

As noted by the court of appeals, ongoing assessment of the child's status occurred in this case. Between April 2006, when the initial dependency order was entered, and the termination trial in May 2008, the juvenile court held three separate review hearings. CP at 81-91, 121-27, 156-63. Each review hearing was presided over by a constitutionally qualified judge. *K.N.J.*, 151 Wn. App. at 312.

In each instance, a superior court judge found that court supervision should continue, and that the reason for removal of K.N.J. from her father still existed. CP at 83-84, 122-23, 158. At each review hearing, the juvenile court found that the "child remains a dependent child pursuant to RCW 13.34.030," and ordered that the child remain in foster care. CP at 87, 124, 159. None of these orders, which constitutionally qualified judges properly entered, has ever been challenged.

Further, the father has never disputed the underlying allegations that K.N.J. was brutally abused while in her mother's care. He has never disputed the allegations that his daughter was abused, neglected and in need of protection. He was aware that the child was being neglected and abused. RP at 30-31, 220-23, 251-53. He was aware of the filing of the dependency petition and the hearing date. RP at 33-34, CP at 19. The father does not dispute that he was in no position to parent the child. CP at 321-22; FF 1.39-1.46. He does not dispute he was offered remedial services throughout the dependency, and concedes he did not successfully participate in those services. CP at 322; FF 1.42, 1.43. He has never disputed that he was accorded due process throughout the dependency, or that he had the opportunity to participate in all dependency review hearings.

In each of three dependency review hearings, the juvenile court affirmed the dependency status of K.N.J. On each occasion, a constitutionally qualified judge found that K.N.J. remained dependent pursuant to RCW 13.34.030. The dependency review orders satisfy the requirement of the termination statute that "the child has been found to be a dependent child." RCW 13.34.180(1)(a). Any defect in the initial order of dependency was cured by the entry of subsequent dependency review hearing orders.

2. The Decision Of The Court Of Appeals Is Consistent With This Court's Decision In *Chubb*.

The father has argued that dependency cannot legally be established at each dependency review hearing. Brief of Appellant (Br. Appellant), *In re Dependency of K.N.J.*, 151 Wn. App. 306, at 14-15. In making this argument, he relies on an erroneous reading of this Court's decision in *Chubb*. He claims *Chubb* held that a dependency review order cannot affirm a finding of dependency. Br. Appellant, *K.N.J.* 151 Wn. App. 306, at 15. The father misconstrues the issue and the holding in *Chubb*.

At issue here is whether subsequent dependency review findings remedied an invalid initial dependency order, and whether, in light of those review findings, DSHS proved at termination that K.N.J. was found to be a dependent child, as required by RCW 13.34.180(1)(a). This Court addressed a very different question in *Chubb*, namely whether a parent could appeal a dependency review order as a matter of right under RAP 2.2(a). *Chubb*, 112 Wn.2d at 721.

In addressing the parent's argument that a dependency review order amounts to a new "disposition order" that is appealable of right under RAP 2.2(a), the *Chubb* Court noted that the review provisions of the dependency statute function as a "built-in review process for the original

disposition.” *Chubb*, 112 Wn.2d at 722. This Court further noted that the review requirements of the dependency statute do not require that a finding of dependency be made at each review hearing, *i.e.*, the facts of the initial dependency need not be relitigated at each review hearing. *Chubb*, 112 Wn.2d at 724. *See also In re K.R.*, 128 Wn.2d 129, 141-42, 904 P.2d 1132 (1995).

As noted by the court of appeals, *Chubb* does not address or rule out the analysis at issue here, namely that review orders result in implicit or explicit findings of continued dependency that satisfy the statutory prerequisite for termination of parental rights that the child has been found dependent.³ *K.N.J.*, 151 Wn. App. at 315. Three such orders were entered here, each finding a need for continued court supervision and each determining that the child remained dependent pursuant to RCW 13.34.030. CP at 87, 124, 159.

3. The Court Of Appeals Decision Is Consistent With Prior Appellate Decisions

The court of appeals decision here is consistent with well-established law that the periodic review of a child’s status results in a reaffirmation of the finding of dependency that cures any defect in the

³ The refusal of the court of appeals to take the expansive reading of *Chubb* urged by the father is also consistent with *In re Dependency of Brown*, 149 Wn.2d 836, 72 P.3d 757 (2003). In *Brown*, this Court noted, “In *Chubb*, we held only that an order of continued dependency following a dependency review hearing is not appealable as a matter of right.” *Id.* at 841.

initial dependency determination. It is these cases, and not *Chubb*, which are directly on point here and should guide the Court in this appeal.

In *Henderson*, during a termination of parental rights trial a mother challenged the validity of a dependency order. *Henderson*, 29 Wn. App. 748 (1981). Division Two of the court of appeals noted that following the original order establishing dependency, the juvenile court continued the child's status as dependent by entering three separate review orders. *Henderson*, 29 Wn. App. at 751. The court further noted that the power of the juvenile court to provide for continued temporary "wardship" of a child is coexistent with a continuation of a status of dependency. *Id.* The review orders therefore constitute "an implicit finding of dependency under RCW 13.34.030." *Id.*

In *A.W.*, upon appeal of a termination of parental rights trial, a father challenged the validity of a dependency order and argued it had been entered without proper notice and in violation of his procedural due process rights. *A.W.*, 53 Wn. App. 22, at 23, 26 (1988). Division One of the court of appeals noted that the dependency status of the child and the parent's progress in remedying parental deficiencies is reviewed every six months. *A.W.*, 53 Wn. App. at 28. The court noted that the father participated in at least two dependency review hearings which resulted in the juvenile court considering his parental fitness or lack thereof. *Id.* As a

result, the juvenile court effectively made a new finding of dependency at each review hearing. *Id.* The father's participation in the hearings, as well as his participation in the termination proceedings, rendered any error in the initial order of dependency harmless. *Id.* at 27, 28-29.

In *H.S.*, both parents challenged an order terminating their parental rights. *H.S.*, 94 Wn. App. 511 (1999). They argued that the parental deficiencies relevant at termination should be limited to those identified in the initial order of dependency and that termination based on deficiencies identified after the entry of the initial dependency order violated their rights to due process. *H.S.*, 94 Wn. App. at 522. Division Three rejected the parents' position and affirmed the termination order. The court noted it was not necessary to reestablish or relitigate the underlying dependency in a termination of parental rights proceeding. *Id.* at 523. Further, the dependency review process resulted in repeated, updated findings that the child was dependent. *Id.* The dependency statute contemplates that circumstances and manifestations of parental deficiencies will change. *Id.* Because the issue at termination is current parental unfitness, the accuracy of the facts underlying the initial finding of dependency is not critical at termination. *Id.* *Accord In re A.S.*, 101 Wn. App. 60, 70-71, 6 P.3d 11 (2000).

Here, three dependency review orders were entered by

constitutionally qualified judges. Each review order found that court supervision should continue, that the father made no progress in remedying his deficiencies, and that the child should remain in foster care. Each order included a finding that the child remained dependent pursuant to RCW 13.34.030. As this Court has noted, the first two elements of the termination statute only require that DSHS prove that the child has been found dependent pursuant to RCW 13.34.030 and that disposition orders have been issued. *K.R.*, 128 Wn.2d at 142.

Any jurisdictional defect in the initial order of dependency was cured during the dependency review process. DSHS proved that K.N.J. was found to be a dependent child, as required by RCW 13.34.180(1)(a), and the order terminating the father's parental rights should be affirmed.

B. The Father's Rights And Interests Were Adequately Protected, And He Suffered No Undue Prejudice By The Decision Below

In his request for review, the father makes a general claim the decision of the court of appeals will deprive parents in dependency proceedings of fundamental rights and protections they would otherwise enjoy. Appellant's Mtn. for Discretionary Rev. at 8. He fails to articulate the rights or protections he believes are in jeopardy, and fails to support his claim with a reasoned argument.

Nevertheless, the court of appeals decision results in no prejudice to parents and does not jeopardize any fundamental right of a parent. Here, the father received all of the process he was entitled to. Similarly, his right to care and custody of his child was adequately protected throughout the termination proceedings. Any error in the initial determination of dependency was cured during the dependency review process and was harmless.

1. The Court Of Appeals Decision Does Not Deprive Parents Of Any Fundamental Right

Like any parent, the father in this case was entitled to basic due process throughout the dependency proceedings. The essential requirements of procedural due process in all dependency (and termination) proceedings are notice, an opportunity for a meaningful hearing, and representation. *In re M.S.*, 98 Wn. App. 91, 94, 988 P.2d 488 (1999); *In re A.G.*, 93 Wn. App. 268, 279, 968 P.2d 424 (1998); *In re Key*, 119 Wn.2d 600, 836 P.2d 200 (1992); *In re Myricks Welfare*, 85 Wn.2d. 252, 254, 533 P.2d 841 (1975).

The father was afforded all of these rights throughout the dependency. He was personally served with the dependency petition and a notice and summons advising him of the preliminary hearing, trial dates, and his right to counsel. CP at 19; *See* RCW 13.34.070. He knew of the

date of the initial dependency fact-finding hearing, but chose not to appear. *Id.* He knew he had a right to a lawyer, but chose not to exercise that right until 18 months after the dependency petition was filed. *Id.*; RP at 7-8, 262. He had the right to present evidence and contest the juvenile court's findings at each review hearing, but he failed to exercise that right. *See* RCW 13.34.090. The father was afforded due process throughout the dependency proceeding. The decision of the court of appeals does not affect these rights, and does not deprive parents of any fundamental right.

Further, the court of appeals decision in this case does not deprive parents of the statutory protections built into the dependency review process. It is well settled that a dependency action is remedial, not adversarial, and is intended to facilitate reunification of a child with her parents if possible. *A.W.*, 53 Wn. App. at 27-28. The potential impact on the parent and child's interest in their relationship in a dependency proceeding is much less intrusive than in termination proceedings. *In re F.S.*, 81 Wn. App. 264, 268, 913 P.2d 844 (1996). "Although an order of dependency may disrupt that relationship, it results in neither an irreversible decision nor complete severance of the parent's contact with the child." *Id.*

The procedural protections inherent in the dependency process, including ongoing and regular reviews of dependency, also reduce any

risk of error. *Id.* "Review hearings are designed to focus attention on the question of the child's dependency status." *In re J.B.S.*, 123 Wn.2d 1, 13, 863 P.2d 1344 (1993). The juvenile court is required to hold a review hearing every six months, and at that hearing the court must make specific findings as to the parent's progress towards correcting parental deficiencies, whether additional remedial services are needed to facilitate reunification, and whether court supervision of the child should continue. RCW 13.34.138. The juvenile court's determination that there is a need for continued state intervention is the essence of a finding of that the child is a dependent child under RCW 13.34.130(6). This ongoing review process, including a party's subsequent participation in the review hearings, renders harmless even due process violations that occur at the initial hearing. *See A.W.*, 53 Wn. App. 22, 27.

K.N.J.'s status as a dependent child was regularly reviewed by the juvenile court as required by the dependency statute. In addition to finding the need for dependency to continue, the juvenile court found that the father failed to visit his child and failed to make progress in services towards reunification. The juvenile court also routinely reviewed the case plan to determine whether it continued to serve the family's needs. These findings were made at hearings presided over by constitutionally qualified judges, and have never been challenged by the father. The father had

every opportunity to be heard and to contest these findings—he simply chose not to do so.

The dependency review process required by RCW 13.34 provides adequate protections to the father. The court of appeals decision does not deprive the father or any other parent of any fundamental right or procedural protection in the dependency process.

2. The Court Of Appeals Decision Presents No Risk That A Parent May Be Erroneously Deprived Of Parental Rights

Although the initial dependency order entered against the father was invalid, that flaw was cured through the subsequent dependency review process. Further, there is no risk that the initial invalid dependency order resulted in the erroneous termination of the father's parental rights. Under the termination statute, the court applies a much higher standard and undertakes a more rigorous inquiry into the question of parental unfitness. The flaw in the initial order of dependency will not taint that process due to these additional protections.

In termination proceedings such as the one at issue here, the finding that the child is dependent is but one of six factors DSHS must prove. The factual accuracy and basis of the initial dependency determination is not deemed critical. *H.S.*, 94 Wn. App. at 523; *Krause v. Catholic Community Services*, 47 Wn. App. 734, 743, 737 P.2d 280

(1987). While a dependency finding means that the parent has fallen below minimal parenting standards such that remedial intervention is warranted, the standards for termination require a showing that the parental deficiencies will not be remedied such that continuing the parent-child relationship would result in harm to the child. *See In re C.B.*, 134 Wn. App. 336, 344-45, 139 P.3d 1119 (2006); *In re I.J.S.*, 128 Wn. App. 108, 118, 114 P.3d 1215 (2005).

Further, any error that affects the initial dependency finding has no prejudicial effect on a subsequent termination proceeding. *A.W.*, 53 Wn. App. at 28. The dependency process is remedial. Progress toward correcting parental deficiencies and reunification are periodically reviewed by the juvenile court. Only when efforts to cure parental deficiencies have proven unsuccessful will termination proceedings be initiated. *Id.* Further, termination of parental rights is not necessarily predicated on the precise circumstances which initially gave rise to state intervention in the first instance. *See H.S.*, 94 Wn. App. at 523. Instead, DSHS must demonstrate parental unfitness by proving the six statutory elements of RCW 13.34.180(1) by a higher standard of proof than is required for a finding of dependency.

The father does not dispute the facts that show this burden was satisfied at the termination trial. He has no parenting skills, has shown no

interest in K.N.J., and has ignored his responsibilities as a parent. CP at 322; FF 1.40., 1.41, 1.46. He has not financially supported the child and visited her just a handful of times during the two-and-a-half year dependency, the last visit being when she was just a year old—18 months before the termination trial started. RP at 25, 224, 265-66. The father has an extensive criminal record and a long history of substance abuse, with numerous unsuccessful attempts at in-patient and out-patient treatment. CP at 316, 321, 322; RP at 35-41 FF 1.14-1.16, 1.37, 1.38, 1.42. His substance abuse renders him incapable of parenting K.N.J. CP at 322; FF 1.44.

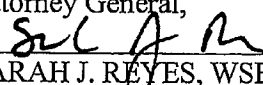
There was no risk of an erroneous termination of the father's parental rights due to the original dependency order's flaw. The father's rights and interests have been adequately protected throughout, and no undue prejudice resulted from the initial invalid order of dependency.

V. CONCLUSION

For the reasons stated above, the court of appeals should be affirmed.

RESPECTFULLY SUBMITTED this 16th day of February, 2010.

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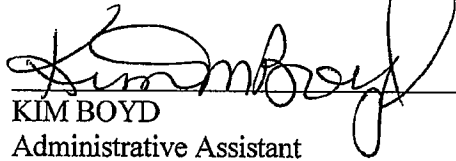
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 11th day of February 2010, at Bellingham, Washington.


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Administrative Assistant